No. 12451

United States
Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

v.

MARY ANN HARRINGTON,

Appellee.

Appellee's Brief

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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STATEMENT OF THE PLEADINGS AND JURISDICTION

Appellant's statement of the pleadings and jurisdiction is accurate, and appellee adopts it as her own.

STATEMENT OF THE CASE

A. *Outline of the issues*—

Appellant's summary of the development of the issues of this case is for the most part accurate. Plaintiff wishes to point out, however, that she has always maintained in her complaint that the defendant's train was negligently put into motion with a violent and unusual jerk. (Par. IV of plaintiff's complaint, and Tr. 5). She has also maintained in her complaint that defendant was negligent in providing a composition flooring which was slippery. (Plaintiff's complaint, Par. IV, Tr. 7). Thus, even though certain theories of negligence advanced by plaintiff in her original complaint were eliminated from the consideration of the jury, there has been no such unusual shift in theory as appellant asserts.

ARGUMENT

Plaintiff's Position:

Plaintiff has contended in this case and still contends that there is sufficient evidence to justify the verdict of the jury for the plaintiff, either

(1) Because of defendant's negligence in starting the train with a violent, unusual and unnecessary jerk, or

(2) Because of defendant's negligence in providing insecure footing between seats by a hard-surfaced composition floor.

Plaintiff believes the jury should have been permitted to decide for plaintiff on the basis of either one of these acts of negligence, and that the trial court committed error in withdrawing the separate consideration of these acts of negligence from the jury. The result of this, however, was to require plaintiff to sustain a heavier burden than she should have been required to sustain. Defendant was in no way injured by this, since plaintiff has been required to and has established two separate acts of negligence as the combined proximate cause of her injury when one would have been sufficient.

Plaintiff wishes to emphasize that the jury was specifically permitted to find negligence in the unusual violent jerk and was further permitted to find negligence in the insecure footing (Tr. 313-14), although

it was not permitted to hold for plaintiff on the finding of negligence in only one of these acts (Tr. 311).

Was There a Negligent, Violent Jerk of the Train?

Obviously, under the instructions of the court, the jury in this case found that the train had been started with a violent, unusual and unnecessary jerk. Defendant doubts the adequacy of plaintiff's evidence as to this violent, unusual jerk. As a basis for its discussion, defendant has set forth certain parts of plaintiff's testimony on direct and cross examination. (Brief of appellant, 9-11). There is certain other testimony which plaintiff believes should be before the court in any consideration of the adequacy of plaintiff's evidence in this regard. The following from the testimony of plaintiff seems pertinent:

"Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat." (Tr. 45)

Q. Mrs. Harrington, could you say at this time whether or not you had struck the arm of the seat or any other objects?

A. No, I couldn't say. The only thing I know, I couldn't open my mouth the next morning with my jaw, so I don't know whether it was just the jar or what that did it." (Tr. 49)

Q. Mrs. Harrington, state whether or not the fall which you experienced in the railroad car was a severe, hard fall, or was it just an easy fall?

A. Oh, my, it was a terrible fall, I thought. I said, 'I am done for.' " (Tr. 89)

Further the testimony of Dr. P. E. Kane on cross examination contains the following matter:

"Q. Of course, the principal fear that most people have to a fall, or elderly people falling, is danger of breaking bones?

A. Yes.

Q. But any fall of a person of her age could result in the bruising of tissue in the surface and interior, could it not?

A. Yes.

Q. That is actually what happened here, was a bruising of the tissue of the kidney?

A. No, it was a tearing of it more than a bruising, a rupturing.

Q. That would not be a surprising consequence of a fall?

A. It would be to me, yes, because we don't see ruptured kidneys very often from any type of injury.

Q. In this case, you believe it resulted from the fall?

A. Yes.

COURT: Then the fall was more than just an ordinary fall?

A. In my opinion, it would be, Judge, yes. I would consider for a ruptured kidney, it would have to have been a severe fall.

Q. Well, Doctor, it might also reflect what sort of object she might have struck in the process of falling, too, isn't that true?

A. I don't know in Mrs. Harrington's case that I could answer that question. In my mind, I doubt very much if that kidney were struck. It may have been. I can't prove or disprove that, only from the history and, as in all accident cases, the patient was very vague. All we know, she hit with force that hurt her back considerably. Whether she struck the kidney proper, or whether it was due to just the force of striking on her back that ruptured the kidney, I am unable to state. I would say it would have to be a severe fall to rupture a kidney.

Q. A severe fall, or probably striking some object in the process of falling?

A. Or a severe blow in that region.

Q. Or a combination of both?

A. Yes. (Tr. 79-80).

Defendant argues that mere adjectives are not enough to impose liability. Plaintiff freely concedes this, but plaintiff's case is not based upon adjectives. It is based upon the physical facts which show the severity of the jerk and the results of that jerk. Plaintiff asserts that there was ample evidence on this subject to justify submission to the jury and obviously there was ample to convince the jury.

It should be emphasized that much of defendant's authority (such as Wade v. North Coast Transportation Co., 5 P.(2d) 986, 165 Wash. 418; Keller v. City of Seattle, 94 P.(2d) 184, 200 Wash. 573) is based upon city street cars rather than railway streamliners. Of course, the standard of care (the highest degree

consistent with practical operation) is the same in each case, but the amount and degree of jerking which will be violent and unusual is manifestly very different. There is a distinction between passenger trains and freight trains in this regard (Wile v. Northern Pacific Railway Co., 129 Pac. 889, 72 Wash. 82).

> "It is a matter of common knowledge that jolts and jerks are usual incidents in the operation of freight trains and therefore negligence cannot be inferred from the mere fact that a passenger's injury resulted from a jar, caused by the sudden stopping of such a train. In other words, a jar, or jerk, in a freight train, is not of itself evidence of negligence."
>
> 2 White, Personal Injuries on Railroads, 670.

The same would apply, probably in a somewhat lesser degree, to the operation of a street car as evidenced by defendant's authorities.

But what of the Milwaukee Olympian, defendant's de luxe streamliner so proudly presented in Appendix A of appellant's brief? Are jolts and jerks usual incidents of travel in such a carrier? Is a passenger bound to anticipate severe jerking? It seems unlikely, and defendant's own witnesses emphasize this point. The following occurred during the examination of the porter, Jesse Love:

> "Q. Just tell me one trip you recall a jerk on.
>
> A. Sometimes it is a little jerk, but it is a very smooth train.
>
> Q. A very smooth train?

A. Yes, sir.

Q. If there were a severe jerk, it would be unusual, wouldn't it, Mr. Love?

A. Yes, sir." (Tr. 227)

Also the point was covered during the examination of the engineer, George Edward Tierney.

"Q. Would there be any jerking of the train if that were to happen?

A. No, sir.

Q. In other words, this train is jerk-proof?

A. Yes, sir, pretty near." (Tr. 266)

So if there was a violent jerk, it was unusual and unnecessary. Facts show that there was such a jerk. Plaintiff's testimony shows a very severe fall. It shows a jerk in starting the train sufficiently strong to throw plaintiff from a balanced, standing position into the serious fall which she has described. The testimony of plaintiff's attending physician shows that the injuries resulting from plaintiff's fall are an indication of its severity and that to account for those injuries the fall would have to be more than ordinary, would have to be severe. This would point directly to the unusual severity of the jerk under the testimony of plaintiff and her physician, which testimony the jury was entitled to believe and did believe. The following Washington cases are important in regard to the physical evidence establishing the nature of the jerk:

Atwood v. Washington Power Co. (1914) 79 Wash. 427, 140 Pac. 343.

The plaintiff, a passenger on a street car, was thrown backward by a violent jerk before reaching her seat. The plaintiff and relatives who accompanied her on the street car characterized the jerk as the most violent they had ever experienced. The verdict for plaintiff was upheld in Supreme Court. The Court said:

> "In Work v. Boston Elev. R. Co., 207 Mass. 447, 93 N. E. 693, cited by appellant, the court, after observing that jerks while running, and jerks in starting and stopping to take on and let off passengers, and lurches in going around curves, are among the usual incidents of travel in electric cars which passengers must anticipate, and that if a passenger is injured by such a jerk, jolt, or lurch there is no liability, said:
>
> " 'On the other hand, an electric car can be started and stopped, for example, with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only, it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises . . . The plaintiff, to make out a case, must go further than merely to characterize the jerk, jolt or lurch and must show (1) by direct evidence of what the motorman did that he was negligent in the way that he stopped or started the car (as in Cutts v. Boston Elevated Railway, 202 Mass. 450), or (2) by evidence of what took place as a physical fact . . .'
>
> "It will be observed this differentiation is covered by the testimony in the case at bar. The testimony

is that the jerk was not only unusual, but the most unusual that witnesses who were accustomed to riding on street cars had ever experienced. In addition to this, the evidence discloses what took place as a physical fact; that is, it shows the physical result of the alleged negligence."

Cassels v. Seattle (1938)
195 Wash. 433, 81 P.(2d) 275.

The plaintiff, seventy-two years of age and of impaired mental faculties, was on a street car with a companion. As she rose to go to the exit the car stopped suddenly with a jerk, throwing her to the floor and injuring her. There was a dispute as to the severity of the jerk. Plaintiff's companion, a younger woman, was only slightly injured and was awarded no damages. Plaintiff, however, was awarded substantial damages and the defendant appeals. The Supreme Court held that where evidence as to the nature of the jerk is in dispute the question is properly one for the jury. On page 437 the Court said:

"Appellant contends that, since the jury awarded Mrs. Gay no damages, it must have disbelieved her testimony as to negligent operation. This does not follow, because there was such a disparity between the ages of Mrs. Gay and respondent that what was negligence with respect to one might not constitute negligence with regard to the other. In addition, the injuries suffered by respondent were of a character much different than those which Mrs. Gay alleged she sustained. The testimony is conflicting as to whether all the seats in the street car were filled with passengers, and quite a number of people were standing.

"The court correctly instructed the jury with respect to contributory negligence, and under the facts disclosed by the record that was a question for the jury to determine."

Again the court emphasized:

"To support a claim for damages occasioned by jerks and jolts on a street car, there must be evidence that the facts and circumstances surrounding the injury show negligence." Wile v. Northern Pacific Ry. Co., 72 Wash. 82, 129 Pac. 889; Annotations 29 LRA (NS) 814.

"It is, however, actionable negligence to cause a street car to give a violent or unusual jerk causing injury to passengers." (Citing cases)

Humphreys v. Seattle (1929)
152 Wash. 339, 277 Pac. 834.

Plaintiff brings action for personal injuries, claiming he was thrown to the floor of the street car by a sudden violent jerk. The jury brought in a verdict for the defendant and the trial court granted a new trial. Upon appeal, defendant claims there was insufficient evidence to go to the jury. Our Supreme Court said on page 341:

"The plaintiff testified that she was thrown violently to the floor because of the sudden jerk or lurching of the street car which she had boarded, and that this sudden jerk or lurching took place before she had an opportunity to secure a seat. She testified fully and completely, not only as to the nature and extent of the injuries which she suffered, but also as to the fact that this was a sudden, unexpected, violent and unusual jerk of the car, and that it was this which threw her

down and caused the injuries. A number of witnesses testified to the contrary. Under such a state of facts, a directed verdict would not have been proper, nor would a judgment non obstante veredicto have been permitted to stand. Caughren v. Kahan, 86 Wash. 356, 150 Pac. 445; Payzant v. Caudill, 89 Wash. 250, 154 Pac. 170."

It should be remembered also that, negligence being failure to use due care under the circumstances, the jerk in question must be judged in relation to the uncertain footing to be considered later and in relation to the age and condition of plaintiff. Rice v. Puget Sound Traction Light & Power Co., 80 Wash. 47, 141 Pac. 191.

Whether or not a young, vigorous person standing on rugging could have withstood the violence of the jerk is of absolutely no concern to us here.

Defendant argues that plaintiff fell to the side rather than backwards against the rear seat. This indicates to defendant that the jerk of starting the train could not have caused the fall. The complete answer to this is that it is not shown that plaintiff fell sideways. She may well have been propelled against the rear seat and then into the aisle. The following is from plaintiff's testimony on cross examination:

"Q. Do you know whether you hit the seat before striking the floor?

A. No, I don't." (Tr. 107)

Plaintiff's reference to the jerk being like one car bumped into another or like a coupling of cars, when

taken in conjunction with the rest of plaintiff's testimony and the effects of the jerk, in no way justifies the conclusion that this was like an ordinary careful coupling of cars. The jerk produced by coupling cars can be violent or non-violent, unusual or ordinary. The use of the phrase "like coupling of cars" in no way characterizes the jerk as an ordinary one, and defendant can claim no comfort from this characterization.

Whether certain witnesses who testified by deposition told a more accurate and believable story of how the fall occurred, as defendant asserts, is of course a matter for the jury to determine, and the verdict of the jury for plaintiff is an ample demonstration of which witnesses were considered more credible by the jury. There was sufficient evidence of the nature and violence of the jerk to carry the matter to the jury, and sufficient to convince the jury.

Was There Negligence in Providing a Composition Flooring Between the Seats Rather than Carpeting?

It should be emphasized at the beginning that plaintiff offered testimony of Norman Hamill, a qualified architect, as to the footing given by the various floors installed on the train (Tr. 148). Plaintiff's witness was not permitted to give this testimony, the court holding (Tr. 152) that the question was within the province of the jury to determine. The jury obviously found that the composition flooring was not as safe as rug flooring and that there was negligence in failing

to provide such safer floor covering. It should be remembered that the defendant railroad was under a duty to foresee that persons of the age and physical condition of the plaintiff would be using the flooring. It should further be remembered that defendant's negligence should be judged in view of the violent jerking to which plaintiff has testified she was subjected.

We submit that consideration of cost, maintenance, appearance, cleanliness and durability, which obviously were so important to defendant (appellant's brief 21) should never be permitted to override consideration of safety. Defendant owed plaintiff the highest degree of care consistent with practical operation of its railroad. Surely it would not be inconsistent with practical operation to have provided as safe footing between the seats as defendant provided in the aisles (and, indeed, between the seats of the de luxe cars). Safety is not a matter of price or class of ticket.

> "The mere fact that the precautions necessary to avoid injury to others are so expensive as to consume all the profits of the business, is not enough to show that such precautions are unreasonable." Shearman & Redfield on Negligence, p. 14.
>
> "The mere cost of giving to another that protection to which the law says he is entitled should never be accepted as an excuse for failure to provide it." Salt River Valley W. U. Assn. v. Compton, 39 Ariz. 491; 8 P.(2d) 249; 40 Ariz. 282; 11 P.(2d) 839.

The defendant, while admitting it has no cases directly in point, claims that the jury cannot decide whether defendant was negligent in providing a composition flooring rather than a rug between the seats. To justify this conclusion, defendant cites a series of cases which do not support the conclusion which defendant seeks to draw from them. Defendant's cases (appellant's brief 22-27) involve such complicated engineering installations as a fusible plug in the crown sheet of a boiler, or the spacing of yard tracks, or the installation of a drainage system, or the location and position of a certain valve. Certainly these are technical, scientific matters. Certainly many technical considerations might enter into the determination of the placement of a fusible plug in the crown sheet of a boiler which would be beyond the knowledge or experience of the average juror. However, there is nothing in the question of placement of a rug or composition flooring and in the relative security of the two floorings which is beyond the experience of the same average juror. Plaintiff is convinced that a careful reading of the cases will show in each case an engineering question involved in the installation being questioned, a decision as to which would be beyond the average juror. Even in the case of a pipeline, a footrest, and a spring on a washroom door, it seems obvious that there are detailed engineering questions involved. But to argue from these cases that the judgment of the railroad as to the make-up of its cars is in every case unassailable is to seek a conclusion which does not follow.

As an extreme example, if a railroad built a group of cars with a hole in each aisle, covered by material insufficient to support a person's weight, and a passenger was injured thereby, it would seem obvious that the fact that the railroad car was intentionally so constructed by the railroad would not excuse that railroad from liability. So in the present case the negligence or non-negligence of defendant rests upon facts within the knowledge of the jury, and the jury does not have to set itself up as an engineering expert in order to determine that negligence. Plaintiff offers one case which she believes is very closely in point. It is Harris et al v. Smith et al, 112 P.(2d) 907. This is a California case in which a prospective tenant stepped from a heavily carpeted lobby floor into an elevator. The elevator floor was linoleum, waxed and polished. The prospective tenant slipped, fell and was injured. A judgment for plaintiff for damages was affirmed on appeal. The court held that the evidence supported a finding that the linoleum was waxed and polished, that no rubber or leather mat or carpet was superimposed to prevent passengers from slipping and falling, and that the use of them would have afforded greater safety to passengers.

The owner of the elevator was held negligent under a California statute requiring the exercise of "utmost care."

In this case the trier of fact was permitted to find negligence in the furnishing of a polished linoleum

floor rather than another covering which would have afforded greater safety. Similarly, the jury in the present case was permitted to find negligence in a composition flooring rather than a rugging which would have afforded greater safety.

Proximate Cause

The jury, believing plaintiff's testimony, could hold that this accident happened as the result of an unusual jerk and of the failure to provide proper floor covering. It is idle to speculate as to whether plaintiff would still have been injured if she had been standing on carpeting. Both acts of negligence were those of defendant and its agents. The two acts in conjunction produced the injury, and speculation as to the degree of responsibility of each individual act of negligence is idle and unnecessary. As stated in Bradley v. Seattle, 160 Wash. 100; 294 Pac. 554:

> "When an injury occurs to a passenger for hire through some conveyance or apparatus of the carrier, in the absence of other showing, it must be assumed to have been due to the negligence of the employees of the carrier which is imputable to the employer."

The present situation is distinguishable from Leach v. School District 197 Wash. 384; 85 P.(2d) 666, in that there the two acts of negligence were on the part of two different individuals. Here the failure to provide adequate flooring must be considered in conjunction with the unusually violent jerk, and the jerk

must be considered in conjunction with the failure to provide adequate safe flooring.

Concurrent Causes—Two or More Acts of Defendant Causing Injury

Appellant claims error in the giving of Instruction No. 30 by the trial court, which instruction reads as follows:

> "You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant." (Tr. 313-314).

In support of its assignment of error in this regard, appellant has adopted a ringing battle cry of "Zero plus zero equals one"; and repeats this cry throughout his brief. This slogan may vividly portray appellant's contentions, but, unfortunately, its mathematics are faulty. A more proper phrase would be "one-half plus one-half can and does equal one." This is clearly so because the two claimed acts of negligence, as committed by appellant railroad, each make up a

portion of appellee's case and added together equal the entire proximate cause. Neither of such negligent acts, as set forth in this instruction, namely, the jerk of the train or the slippery asphalt tile floor, would have to constitute the entire proximate cause of the injury in itself. The proper rule is set forth as follows:

> "Where either one of two defects alone would not have caused injury, the two defects together constitute the proximate cause, although each contributed in an unequal degree." 45 C. J., page 907, Sec. 480.

Therefore, despite appellant's contention that appellee's counsel have unearthed a new and novel doctrine of law, unknown for centuries, and despite appellant's contention that the trial judge incorrectly adopted such new and novel theory of law, the true fact appears to be that appellant did not make sufficient research into the known law, as there are cases clearly adopting and setting forth the previous rule as contained in 45 C. J. at page 907, Section 480.

Some of the cases which clearly follow this rule and which would be sufficient basis to authorize the court's instruction No. 30 to the jury in the present case are as follows:

> McGregor v. Reid, etc., Co.,
> 178 Ill. 464, 53 N. E. 323

holding that thus the proximate cause of an accident from the falling of an elevator where the cable pulled out and the "dogs" failed to work, neither of which

alone would have caused the fall, is not the pulling out of the cable alone, but that and the condition of the "dogs." The court stated:

> "The two causes operated together and neither alone would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable, for both causes operating proximately, at the same time, caused the injury. 16 Am. & Eng. Enc. Law 44."

The Court in said case went on to say that it was for the jury, and not for the Court, to decide whether there was a defective condition and whether it was known to the owner of the conveyance.

> Etheridge v. Norfolk Southern Railway Co. (Virginia) 129 S. E. 680

wherein the Court stated:

> "As a matter of primary definition it would probably not occur to the wayfaring man that an accident could be the result of more than one proximate cause and it is reasonably clear that he would believe that such an expression was intended to designate that cause which in a major degree brought about the result under consideration. This, however, is not necessarily true. A cause without which something would not have happened is a proximate cause, but it is not necessary that such cause be the major cause. It is also true that there may be more than one proximate cause. Heat, moisture and springtime may stir a dormant bud; each would be a proximate cause and this would not be changed, even though

> it should appear that they contributed to that result in an unequal degree."

Similarly, it is respectfully submitted, the jerk of the appellant's supposedly "smooth-running" streamliner and the slippery footing afforded appellee by the car's asphalt tile floor (economic though it might be to install and to clean) could both properly be proximate causes when considered together.

In City of Louisville v. Hart's adm'r (Kentucky) 136 S. W. 212, on pages 215 and 216, the Court clearly sets out the rule where two acts occur to cause the damage, which neither alone, by itself, could cause:

> "Two agencies acting entirely independent of the other as in this case may jointly and concurrently be the proximate cause of an injury, when it would not have happened except for the concurrence at approximately the same time and place of the two negligent acts";

citing Cooley on Torts, p. 78, and Shearman and Redfield on Negligence, Section 39, also Section 346.

Also in the case of

> Palyo v. Northern Pacific Railway Co.,
> 144 Minn. 398, 175 N. W. 687

the same rule was adopted. In that case plaintiff, a passenger on one of defendant's trains, was injured on March 21, 1921, while alighting from the train. Accompanied by Mr. and Mrs. Thurston and their children, plaintiff boarded the train at Baudette to go to Graceton in Minnesota. On arrival at Graceton Mr.

Thurston got off first. As Mrs. Thurston, followed by plaintiff, was getting off, the train began to move. Mrs. Thurston got off but plaintiff fell or was thrown from the steps of the day coach and was injured. Plaintiff testified the brakeman seized her arm, said "come on," and pulled her from the steps, and she is corroborated by Mrs. Thurston and one of the children. She is contradicted by the brakeman and by defendant's assistant superintendent, who was an eye witness. Verdict for plaintiff, and defendant's appeal from an order denying their alternative motion for judgment or a new trial. Held: Judgment for plaintiff affirmed. The Court there stated:

> "The attention of the jury was called to Section 4399 G. S. 1913, and they were instructed that defendants were negligent in starting the train before plaintiff got off, but that such negligence was not to be considered unless it was the proximate cause of her injuries. Defendants insist it could not be a proximate cause, in view of plaintiff's testimony that she did not intend to get off until the train stopped and would have stayed where she was if the brakeman had not pulled her off. We are of a contrary opinion. *If plaintiff's testimony is true, two acts combined to produce the injury: The setting of the train to motion before she got off, and the brakeman's act in getting her off after the train was in motion. Defendants were responsible for both acts. In combination, they caused plaintiff to fall upon the station platform. Each was a proximate cause of her injury.* Palyo v. N. P. Ry. Co., 144 Minn. 398; 175 N. W. 687." (Italics ours.)

Also two or more concurring acts of negligence combine to cause an injury in the following cases:

Lake v. Emigh (Mont., March 1948)
190 P.(2d) 550.

Action by Tyyne Lake against John Emigh, as administrator of the estate of Eli Virta to recover for injuries sustained by plaintiff while a tenant in defendant's building. Judgment for plaintiff and defendant appeals.

Virta was the owner of three houses on the corners of Lee Avenue and Broadway in Butte. In the rear of the houses were three clotheslines. The line involved in the case was a rope running over pulleys from the house to a telephone pole in the rear. It was necessary to ascend a ladder six or seven feet high, the top of the ladder was nailed to the house, and there was a board eight inches wide and twenty inches long upon which the person using the line to hang clothes had to stand. On November 25, 1935, while plaintiff was hanging clothes from said ladder, the clothesline broke and she fell a distance of six or seven feet to the ground and suffered the injuries complained of. Two grounds of negligence were alleged:

(1) That defendant and his agents allowed the clotheslines to become weak and rotten and not in a reasonably safe condition for the use for which they were intended.

(2) That defendant allowed the ladder to become

loose from its fastenings and become unsteady and not in a reasonably safe condition for use. Defendant pleaded contributory negligence of plaintiff as the sole cause of her injuries. Held:

> "We will now consider the contentions advanced by defendant." ". . . Second, that the breaking of the clothesline was not the proximate cause of the plaintiff's injuries because of intervening causes, including the narrow platform, lack of any handhold, and the shaking of the ladder, all of which it is claimed broke the sequence of events and were new and independent causes of plaintiff's injuries. If the lack of a handhold, the narrowness of the platform and the shaky condition of the ladder were contributing causes to plaintiff's injuries, it is sufficient to say that defendant was responsible for all of said causes and it is immaterial which of them was the proximate cause of plaintiff's injuries. 45 C. J. Sec. 487, page 924, states the law as follows: 'Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against either or all of the responsible persons, although one of them was more culpable, and the duty owed by them to the injured party was not the same. Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which was the proximate cause.' " (Citing authorities in the accompanying case notes.)

See also

> Oklahoma Gas & Electric Co. v. Butler (Okla. 1942); 124 P.(2d) 397

in which the Oklahoma Court announces the same rule in effect:

> "We deem it unnecessary to deal further with the matters raised by defendant's contention, in view of the announced principle that where several causes produce an injury, and each is an efficient cause without which the injury would not have occurred, then the injury may be attributed to any or all of such causes."

The Oklahoma Court in

> M. & D. Motor Freight Lines v. Kelley
> (Okla. 1949) 202 P.(2d) 215

stated as follows:

> "Where although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

> Hild v. St. Louis Car Co.
> (Mo. 1924) 259 S. W. 838

Plaintiff worked for defendant's mill several days and was then transferred to the blacksmith shop as a blacksmith's helper. Plaintiff was instructed by the blacksmith how to operate a bending machine. Sparks from a nearby molding hammer flew over by the bending machine plaintiff was working on, and on this particular occasion said sparks hit him in the face and neck and he dodged; in so dodging he hit the operating lever for the bending machine with his left hand, opening it a little, which allowed compressed air to enter the chamber slowly; when plaintiff reached for a piece

of metal to remove from the machine the chamber filled with air and the piston came forward and the dies closed before he could get his fingers out. Verdict for plaintiff, the defendant appeals. Defendant pleads contributory negligence on plaintiff's part. Held: Judgment for plaintiff affirmed.

> "It is not the law that plaintiff may not go to the jury upon one negligent act of defendant shown to have proximately contributed to plaintiff's injury merely because some other negligent act of defendant also contributed to the injury and the plaintiff would not have been injured without the concurrence of such other act. We cannot subscribe to the doctrine that plaintiff is not entitled to recover for one negligent act of defendant proximately contributing to plaintiff's injury because the injury would not have resulted without the concurrence of another negligent act of the defendant. The injured party may recover for any negligent act directly contributing to his injury, regardless of what other negligent act may contribute, concur, or co-operate to produce the injury."

See also:

> Carr v. St. Louis Auto Supply Co.,
> Mo. 239 S. W. 827, at p. 829;
>
> Spaulding v. Metropolitan Street Railway Co.
> (Mo.) 107 S. W. 1049;
>
> Meeker v. Union Electric Light & Power Co.
> (Mo.) 216 S. W. 923;

and other cases cited on page 841 of

> Hild v. St. Louis Car Co.,
> 259 S. W. 838.

Cole et al v. Gerrick et al
(Wash. Feb. 1911), 113 Pac. 565:

Action to recover damages for defendant's alleged negligence which caused the death of George Cole, husband and father of plaintiffs. The intestate was employed as a structural iron worker for defendant on a new building being constructed in Tacoma. The intestate was engaged with another iron worker and the foreman in attempting to place in permanent position an iron channel beam, weight three hundred (300) pounds, which was twelve feet long, on the thirteenth floor. The foreman passed on a signal to have the beam lowered, but the signal was misinterpreted or not properly obeyed by the operators of the crane and so, instead of lowering the beam it was swung toward the inside of the building. Cole was holding onto the beam to steady it into position and by this unexpected movement he was pulled toward the interior before he could leave go and in attempting to regain his balance he fell outside of the wall and down to the sixth floor and met his death. The wall Cole stood on had been built just the day before and had not yet set, so the bricks were easily displaced, and in attempting to regain his balance Cole loosened a couple of bricks, rendering his footing less secure. The negligence plaintiffs rely on was the wrong signal being given and also defendants attempting to place the beam in position before the wall had set enough to make it a safe place to work. Defendants assert as a defense contributory negligence

of Cole in going on the wall while it was in an unsafe condition. Judgment for plaintiff. Held: Judgment for plaintiff affirmed. The Court said:

> "It is contended that the appellants were not responsible for the condition of the wall, since the building of it was no part of their contract. We think there was good ground for contending that appellants' foreman knew of the unsafe condition of the wall, and also knew that in placing this channel the iron workers would probably walk upon the wall as Cole did, and also that Cole was not warned of the condition of the wall. However, even if appellant was not responsible for the condition of the wall as a concurring cause of Cole's fall, that fact would not relieve appellant, if the jury believed the fall of Cole would not have occurred but for the error in communicating or obeying the signals, thereby causing the wrong and unexpected movement of the channel. And we have seen this question was for the jury. This contention is well answered by the mere statement of the elementary rule found in 2 Labatt, Master & Servant, at Sec. 813, as follows: 'Where several causes concur to produce certain results, any of them may be termed "proximate," provided it appears to have been an efficient cause. The general rule applicable to all cases illustrating this situation, except those in which the contributory negligence of the servant himself is involved, is that, in order to establish the right of action, it is merely necessary to show that one of the cooperating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good whether the other causes were also defaults for which he was responsible, or were due to some event or some conditions for which he was not required to answer.' To the same effect is Black's Law and Practice in Acci-

dent Cases, Sec. 21. The liability of the appellants growing out of the wrong communication of or erroneous acting upon signals under such conditions as this evidence tends to prove we think has been fully established by former decisions of this court."

Westerland v. Pothschild,
53 Wash. 626; 102 Pac. 765.

In a recent case (1940) the Supreme Court of the State of Washington passed upon a case somewhat similar to the instant one in

Eckerson v. Ford's Prairie School District
No. 11, 3 Wn.(2d) 475.

In that case a little girl was hurt in a schoolyard accident when she stumbled on the apron of a top step, which apron protruded above the school grounds a very slight distance. After so stumbling, the little girl continued off-balance down the steps until she suddenly collided with a glass, unscreened door in close proximity to the foot of the stairway, which door was suddenly slammed shut by a schoolmate. The Court said:

"There can be little doubt that the elevated condition of the top step, or apron, was an actual cause, or cause in fact, of respondent's stumbling and, further, that but for the position of the unscreened, glass-paneled door in close proximity to the foot of the stairway, the accident would not have resulted in the way that it did.

"From the evidence in the case, the jury could logically find that these factors, taken in connection with the fact that the children were permitted to play on the stairway, constituted negligence on

the part of appellant, and that there was a necessary causal connection between such negligence and the injuries sustained by respondent.

"Appellant insists, however, that even if it be held that there was primary negligence on its part, the chain of causation was broken by a new, independent and intervening act of negligence committed by the boy who suddenly slammed the door shut, and that his act was unforeseeable, and, accordingly, eliminated from appellant's negligence its proximate causality and became, instead, the superseding cause. This contention may be disposed of on either one of two grounds.

"In the first place, it was within the province of the jury to determine whether the act of the boy was a superseding cause, or simply a concurring one. The jury may well have found, under the evidence, as it apparently did, that the injury was traceable to the negligent condition of the top step, and that such condition was the proximate cause without which the injury would not have occurred; further, that while the negligent act of the boy was also a proximate cause, it merely combined or concurred with the continued effect of appellant's negligence to produce the result, but did not supersede it.

"The rule in such cases, as stated in Restatement of the Law of Torts, 1184, Par. 439, is that:

'If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.'

"This court has consistently followed that rule. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac.

64; Cole v. Gerrick, 62 Wash. 226, 113 Pac. 565; Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 Pac. 645, 132 Pac. 860; Hellan v. Supply Laundry Co., 94 Wash. 683, 163 Pac. 9; Duggins v. International Motor Transit Co., 153 Wash. 549, 280 Pac. 50; Caylor v. B. C. Motor Transportation, Ltd., 191 Wash. 557, 85 P.(2d) 1064."

It seems clear in our present case that the accident and the serious injury to appellee resulted from the jerk or jolt of this train under circumstances where appellee's footing was insecure by reason of the slippery asphalt tile floor on which she was compelled to stand. The reasoning of the Washington Court in said case of Eckerson v. Ford's Prairie School District No. 11, applies to a school child, it is true, but in our present case we have an elderly lady, and it would appear that the railroad company should have foreseen the hazard of such an asphalt tile floor in combination with a jerk or jolt of said train, just as the Washington Court in the Eckerson case held that the School District should have foreseen the hazard of the slightly defective step combined with the proximity of the glass door.

Also see

Seibly v. Sunnyside,
178 Wash. 632, 35 P.(2d) 56.

By way of further comment upon appellant's ringing phrase of "Zero plus zero equals one," it may be said that there are not too many factual situations wherein an injury is caused by two independent acts or agencies joining together to be jointly and concur-

rently the proximate cause. However, because this happening does not occur more often is no valid reason to attack the rule of law which we have set forth and upon which the trial court based its instruction No. 30.

Two or More Acts of Defendant Causing Injury—Question of Proximate Cause

45 C. J. Negligence, Sec. 487, page 924.

> "Injury attributable to all or any one of several concurrent causes. Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes and recovery may be had against either or all of the responsible persons, although one of them was more culpable, and the duty owed by them to the injured person was not the same.
>
> "*Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which is the proximate cause.*" (Italics ours)

Also this rule is set forth in Thompson on Negligence, Vol. I, Sec. 69:

> "Injury from Several Causes for All of Which the Defendant Is Responsible.—The question of proximate cause does not arise in an action for personal injuries occasioned by an accident resulting from two or more causes, for all of which the defendant is responsible."
>
> Newcomb v. New York Central & H. R. R. Co. (Mo. 1904) 81 S. W. 1069.

In this case plaintiff was a passenger from St. Louis to New York; the part of the route plaintiff

traveled on defendant's train was to be from Buffalo to New York. Plaintiff had a twenty-minute lay-over in Buffalo where he met a friend, Mr. Knox. Plaintiff was mistaken in his belief that Mr. Knox and he were to go on to New York together, for Knox was to go by the "West Shore Line" and plaintiff by New York Central. They saw no usher to direct them to the train; plaintiff became separated from Mr. Knox and, seeing a train moving, asked a porter on that train if it was the train to New York; the porter said yes, so plaintiff boarded it. Plaintiff then learned he was on the wrong train and the porter told him to jump off. The train was then moving very slowly. Plaintiff jumped to the platform from the stairs of the car. The platform had an incline at this point descending about one-half inch to the foot, and on the incline was grease or oil. Plaintiff, when he landed on the platform, slipped and fell and slid under the car and his leg was run over so seriously that it later required amputation. There was a lateral space of seven inches between the edge of the platform and the step of the car, and expert witnesses testified this was an unsafe condition and increased the danger to people getting off trains. From a judgment for plaintiff defendant appeals a second time.

One of plaintiff's instructions was to the effect that if plaintiff found the train he left at Buffalo had moved to another track and if defendant failed to exercise reasonable care to direct him to it and as a

result of defendant's failure to so conduct itself, plaintiff got on the wrong train, and when he got off said wrong train slipped and fell, then such omission of defendant to exercise ordinary care was negligence. The Court affirmed, with the following comment:

> "Another objection made to this instruction is that the negligence referred to therein was not the proximate cause of the accident. It was the cause of plaintiff's being in the position from which, in trying to extricate himself, the injury resulted. Unless, therefore, between the getting into that position and the accident, some other cause intervened, the act of the defendant which led the plaintiff into the position was the direct cause of the accident. And if there was another cause intervening, which combined with the former act to produce the injury, and if the defendant was responsible for that cause also, it cannot be held to be such an independent cause as to relieve the defendant from liability for its initial act of negligence; that is to say, if the defendant's negligence was the cause of the plaintiff's getting on the wrong train, and he was injured in trying to get off without any negligence on his part, the fact that the danger attendant on his alighting was increased by the further negligent act of the defendant in reference to the condition of the platform would not relieve the defendant from liability for its first act of negligence on the ground that it was remote from the accident. In Thompson on Negligence, Vol. I, Sec. 69, it is said: 'The question of proximate cause does not arise in an action for personal injuries occasioned by an accident resulting from two or more causes for all of which defendant is responsible.' There was no error in the instruction."

Kraut v. Frankford and S. P. City Pass. Ry. Co. (Pa. 1894) 28 A. 783

Defendant had two tracks on Berks Street and plaintiff intended to cross same. When plaintiff reached the corner and before he left the pavement he saw a car coming east on Berks Street, on the track further from him, and twenty or thirty yards from the crossing. He started to cross Berks Street, supposing he could do so before the car reached him. After crossing the first track he saw the car was coming fast, so stopped and stepped back. As he did so his foot sank into a hole or among loose cobblestones and he was thrown forward; he fell with both arms across the track and the hind wheel of the car ran over him, causing injuries which required amputation. Held for plaintiff. Held on appeal: Judgment for plaintiff affirmed.

> "The duty of the defendant to keep the street in proper repair, and the fact that the car approached the crossing at an unusually rapid rate, were either admitted or so clearly established at trial as not to be in dispute . . . There seems to be no sufficient reason for entering upon any discussion of remote and proximate cause to which so much attention was given by counsel for the appellant on the trial of the case and its argument here . . . If either cause had been absent the accident would not have happened. The unusual speed of the car and the defective crossing were both factors, and, as the defendant was responsible for both, it is useless to speculate as to which was the remote and which was the proximate cause."

Williams et al v. Chicago B. & Q. Ry. Co. (Mo. 1913) 155 S. W. 64

Plaintiff is the curator of two minor children, ages three and six, whose father was killed in a wreck of one of defendant's trains. It was shown the train was going south at thirty-five miles per hour. There was evidence, such as indentation of the ties and jolting of cars noticed by passengers, which tended to prove that one or more cars left the rail about 450 feet before reaching the place of the wreck, but the train ran safely that distance and then, after passing over a switch, began to break and tear up rotten and defective ties for a space of 150 feet, causing the wreck. Defendant claims the proximate cause was the leaving of the rail 450 feet away from the scene of the wreck, for which it was not chargeable, and not the defective track and roadbed as charged in the petition. From judgment for plaintiff defendant appeals. Held: Judgment for plaintiff affirmed.

> "The fact that the wheels of a car in a passenger train leave the rail and run along on the ties, showing no sign of a defective wheel or trucks, is evidence tending strongly to show, prima facie, that there was a defective track or roadbed as charged in plaintiff's petition at that point also and it can well be regarded as proved that defendant was guilty of negligence at both places, or, to express it differently, was negligent in both causes. The Supreme Court in quoting from 1 Thompson on Negligence, Sec. 69, says that: 'The question of proximate cause does not arise in an action for personal injury occasioned by an

accident resulting from two or more causes, for all of which the defendant is responsible.' Newcomb v. Railroad, 182 Mo. 687, 721; 81 S. W. 1069. In Kraut v. Railroad, 160 Pa. 327, 335; 28 Atl. 783, the Court said: 'If either cause had been absent, the accident would not have happened . . . and, as the defendant was responsible for both, it is useless to speculate as to which was the remote and which the proximate cause.'

"There is another view which supports plaintiff's case, even conceding defendant not to be chargeable with negligence in the car leaving the track before reaching the point of the wreck. If the act alleged as the ground of the action (defective track at place of wreck) is the cause, it need not be the sole cause. If there is another cause in addition to the negligence alleged, the latter 'would be held a concurrent cause.' I White's Personal Injury on Railroads, Sec. 26. The fact that one of the cars 'climbed the rail' before reaching the defective ties where the wreck occurred was not the sole cause of the injury, for the injury would not have occurred but for the concurring cause of decayed and rotten ties. The latter is therefore a proximate cause, for which defendant is liable." (citing cases).

In Ring v. City of Cohos, 77 N. Y. 83, 90, it was stated:

"When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened."

Concurrent Causes in General

From previously cited cases it will be seen that the law of the State of Washington, as set forth in the decisions of its Supreme Court, follows the general rule in respect to joint and concurrent causes as set forth in 38 Am. Jur. Negligence, Sec. 63:

> "An injury cannot be attributed to a cause unless, without it, the injury would not have occurred. Accordingly, the mere concurrence of one's negligence with the proximate and efficient cause of a disaster will not impose liability upon him; it is well settled, however, that negligence in order to render a person liable, need not be the sole cause of injury. It is sufficient for such purpose that it was an efficient concurring cause, that is, a cause which was operative at the moment of the injury and acted contemporaneously with another cause to produce the injury, and was an efficient cause in the sense that, except for it, the injury would not have occurred . . . Under the rule that the Court will trace an act to its proximate and not to its remote consequences, there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury . . ."
>
> "Clearly, two acts committed directly by the defendant, or by a person for whose conduct he is responsible, which combined to cause an injury to the plaintiff, may each constitute a proximate cause of the injury."

45 C. J., Negligence, Sec. 488, page 925.

> "What are Concurrent Causes? Concurrent causes within the rules above stated are causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either. But where the negligence

> of one consists in a condition merely which is rendered injurious by the subsequent negligence of a third person, the acts of the two persons are not concurrent. So, if two distinct causes are successive and unrelated in operation, they cannot be concurrent; one of them must be the proximate and the other the remote cause, and this applies where one of the unrelated causes is extraordinary and unexpected. The mere fact that the concurrent cause was unforeseen will not relieve from liability for the act of negligence, unless it was so extraordinary and unexpected that it could not have been anticipated." (And cases cited in notes.)

Other decisions of the State of Washington approving the doctrine of concurrent causes are Young v. Smith, 166 Wash. 411, 7 P.(2d) 1; Lindsay v. Elkins, 154 Wash. 588, 283 Pac. 447.

Plaintiff Is Not Guilty of Contributory Negligence

Appellant has assigned error on the Court's refusal to grant its motion for directed verdict and upon the Court's refusal to grant its motion for judgment in its favor and against the plaintiff setting aside the verdict theretofore returned in favor of plaintiff in said cause. One of the grounds for appellant's motion for directed verdict was that the plaintiff, Mrs. Mary Harrington, was guilty of contributory negligence. (Tr. 304)

It is, of course, appellee's contention that said passenger, Mrs. Mary Harrington, did not have to call the porter to have him hang up her hat. She had a perfect right to stand up on this train, particularly in

view of appellant's testimony that the Hiawatha Streamliner was normally a very smooth-running train. It is a well-known fact that this streamliner is advertised widely as being very smooth in its operation. (See appellant's own exhibit entitled *Appendix "A,"* as attached to the back page of appellant's brief.)

Certainly appellant cannot claim that a passenger is required to ring for the porter before said passenger can stand up from his seat while the train is in operation in the event such passenger wishes to go to the dining car or lavatory. If a passenger desires to stand up to hang up his hat there certainly would be no distinction.

The Supreme Court of the State of Washington, in the case entitled

> Lane v. Spokane Falls and Northern Ry. Co., 21 Wash. 119, 57 Pac. 367; 46 L. R. A. 153

held that a passenger, as a matter of law, could not be held guilty of contributory negligence for standing in the aisle. A similar rule is set forth in

> Shearman & Redfield, Vol. 3 at page 1392

> "There is no rule forbidding passengers on a train to change their seats or to move from one car to another, so long as they act prudently in doing so. Therefore, the mere fact that an injury would not have been suffered, had the passenger remained in the seat or car which he first took, is not proof of contributory negligence. Even while a train is in motion such a change may be made, if consistent with the ordinary prudence of prudent man . . . 'Nor can they be required to sit still. The

law, which makes liberal allowance for the natural restlessness of dogs, must surely make equal allowance for the restlessness of the average man. Long train journeys are monotonous and trying, at their best, and active men find it impossible to sit still all the way. No special reason for moving need be assigned. The only question is, whether, under all the circumstances, the act was one natural to a prudent man, exercising his prudence.' "

Also it is stated in

Elliott on Railroads, Vol. 5, page 224

"It is generally a question of fact for the jury to determine, under the circumstances, whether a passenger is guilty of contributory negligence in standing up in a passenger car."

Meeks v. Graysonia N. & A. R. Co. (Ark. 1925) 272 S. W. 360, is also of interest on the question of contributory negligence.

See also 45 C. J. Negligence No. 516.

It may be pointed out that the State of Washington expressly repudiates the doctrine of comparative negligence in the cases of Woolf v. Washington R. R. and Nav. Co., 79 Pac. 997, and Scharf v. Spokane & I. E. Ry. Co., 159 Pac. 797.

Also the Washington Supreme Court has held that plaintiff's contributory negligence to defeat recovery must wholly or partially be the cause of injury.

Richardson & Holland v. Owen,
148 Wash. 583, 269 Pac. 838.

It appears clear that this should dispose of appellant's theory that appellee's contributory negligence is a bar to this action. Under the law of the State of Washington, appellee could not be held guilty of contributory negligence as a matter of law and the jury decided as a matter of fact that there was no contributory negligence of such a nature as to bar the recovery.

CONCLUSION

If the testimony of defendant's witnesses is believed, the jury should, of course, have held for defendant. If plaintiff's testimony is believed, then the jury was entitled to hold for plaintiff as it did.

> Lane v. Spokane Falls and Northern Ry. Co., 21 Wash. 119, 57 Pac. 367.

Plaintiff contends that the court committed no error in its instructions to the jury, that there was sufficient evidence of negligence to go to the jury, and that the verdict and judgment have ample support in fact and law.

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